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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 CANDACE WENE,

Civil No. 05-1415-AA
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 JO ANNE B. BARNHART,
Commissioner of Social Security,

14 Defendant.

15 _____
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Attorney for plaintiff

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25 AIKEN, Judge:

26 Claimant, Candace Wene, brings this action pursuant to the
27 Social Security Act (the Act), 42 U.S.C. § 405(g), to obtain
28

1 judicial review of a final decision of the Commissioner. The
2 Commissioner denied plaintiff's application for Supplemental
3 Security Income (SSI) disability benefits under Title XVI. 42
4 U.S.C. §§ 405(g), 1383(c)(3). For the reasons set forth below,
5 the Commissioner's decision is affirmed and this case is
6 dismissed.

7 **PROCEDURAL BACKGROUND**

8 Plaintiff protectively filed her application for SSI
9 benefits on December 20, 2001. Tr. 82-85. Her application was
10 denied initially, tr. 53-57, and upon reconsideration. Tr. 60-
11 62. No appeal followed. Plaintiff filed her second and current
12 application for benefits on January 29, 2003. Tr. 86-92. That
13 application was denied initially, tr. 35-38, and upon
14 reconsideration. Tr. 44-46. On May 20, 2004, the Administrative
15 Law Judge (ALJ) held a hearing at which he heard testimony from
16 plaintiff who was represented by counsel. Tr. 1155-74. On
17 November 10, 2004, the ALJ held a supplemental hearing at which
18 he heard testimony from a vocational expert. Tr. 1175-95.
19 Plaintiff's counsel, but not plaintiff, was present at the
20 supplemental hearing. Id.

21 On April 12, 2005, the ALJ found that plaintiff had the
22 residual functional capacity to work at a reduced range of light
23 work and could perform her past relevant work as a fast food
24 worker and motel cleaner. Tr. 13-26. Therefore, the ALJ found
25 plaintiff not disabled within the meaning of the Act. Tr. 25-26.
26 The Appeals Council declined plaintiff's request for review
27 making the ALJ's decision the final agency decision. See 20
28 C.F.R. §§ 404.981, 416.1481.

1 **STATEMENT OF THE FACTS**

2 Plaintiff was 41 years old at the time of the ALJ's
3 decision. Tr. 1159. She obtained a high school education. Tr.
4 113. Plaintiff performed past work as a stock person, fast food
5 worker, blackjack dealer, motel cleaner, and caregiver. Tr.
6 1182-83. She last worked on December 22, 2000, when she was laid
7 off from her temporary job. Tr. 1162-63.

8 **STANDARD OF REVIEW**

9 This court must affirm the Secretary's decision if it is
10 based on proper legal standards and the findings are supported by
11 substantial evidence in the record. Hammock v. Bowen, 879 F.2d
12 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
13 mere scintilla. It means such relevant evidence as a reasonable
14 mind might accept as adequate to support a conclusion."
15 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting
16 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).
17 The court must weigh "both the evidence that supports and
18 detracts from the Secretary's conclusions." Martinez v. Heckler,
19 807 F.2d 771, 772 (9th Cir. 1986).

20 The initial burden of proof rests upon the claimant to
21 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
22 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
23 an "inability to engage in any substantial gainful activity by
24 reason of any medically determinable physical or mental
25 impairment which can be expected . . . to last for a continuous
26 period of not less than 12 months. . . ." 42 U.S.C.
27 § 423(d)(1)(A).

28 The Secretary has established a five-step sequential

1 process for determining whether a person is disabled. Bowen v.
2 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,
3 416.920. First the Secretary determines whether a claimant is
4 engaged in "substantial gainful activity." If so, the claimant
5 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.
6 §§ 404.1520(b), 416.920(b).

7 In step two the Secretary determines whether the claimant
8 has a "medically severe impairment or combination of
9 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
10 §§ 404.1520(c), 416.920(c). If not, the claimant is not
11 disabled.

12 In step three the Secretary determines whether the
13 impairment meets or equals "one of a number of listed impairments
14 that the Secretary acknowledges are so severe as to preclude
15 substantial gainful activity." Id.; see 20 C.F.R.
16 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
17 presumed disabled; if not, the Secretary proceeds to step four.
18 Yuckert, 482 U.S. at 141.

19 In step four the Secretary determines whether the claimant
20 can still perform "past relevant work." 20 C.F.R.
21 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
22 disabled. If she cannot perform past relevant work, the burden
23 shifts to the Secretary. In step five, the Secretary must
24 establish that the claimant can perform other work. Yuckert, 482
25 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &
26 (f). If the Secretary meets this burden and proves that the
27 claimant is able to perform other work which exists in the
28 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,

1 416.966.

2 DISCUSSION

3 ALJ's Findings

4 Following the five-step sequential evaluation outlined
 5 above, at Step One, the ALJ found that plaintiff had not engaged
 6 in substantial gainful activity from the alleged onset date. Tr.
 7 18, 26, Finding 1. See 20 C.F.R. § 416.920(b). This finding is
 8 not in dispute. At Step Two, the ALJ found that plaintiff had
 9 the following severe impairments: atrophy and contracture of the
 10 right hand and forearm, status-post surgery; borderline
 11 intellectual functioning; depressive disorder; personality
 12 disorder; and polysubstance abuse disorder. Tr. 18, 25, Finding
 13 2. See 20 C.F.R. § 416.920(c). This finding is not in dispute.
 14 At Step Three, the ALJ found that plaintiff's impairments did not
 15 meet or equal the Listings. Tr. 18, 25, Finding 2. See 20
 16 C.F.R. §§ 416.920(a)(4)(iii); 416.920(d). This finding is not in
 17 dispute.

18 The ALJ next determined that the plaintiff had the residual
 19 functional capacity to perform light work, and had limitations in
 20 fingering with her right hand, limited grip and gross
 21 manipulation with her right hand, and was unable to crawl or
 22 climb ropes, ladders, and scaffolds, had moderate limitations in
 23 her ability to remember and carry out detailed instructions and
 24 in making realistic goals or independent plans, capable of
 25 understanding and carrying out basic instructions and procedures,
 26 including performing work tasks consisting of one to two steps.
 27 Tr. 24, 26, Finding 4. See 20 C.F.R. § 416.967. This finding is
 28 in dispute. At Step Four, the ALJ found that plaintiff could

1 perform her past relevant work as a fast food worker and motel
2 cleaner. Tr. 25-26, Finding 5. See 20 C.F.R. §§
3 416.920(a)(4)(iv), 416.920(f). This finding is in dispute.
4 Alternatively, the ALJ found that at Step Five, plaintiff was
5 able to perform other work that existed in significant numbers in
6 the national economy including cashier, ticket seller, or office
7 helper. Tr. 25-26, Finding 6. This finding is in dispute.

8 Plaintiff's Objections to the ALJ's Findings

9 Plaintiff objects to the ALJ's findings based on the fact
10 that plaintiff was not allowed to testify at the supplemental
11 hearing, nor was plaintiff's counsel allowed to ask any questions
12 of plaintiff. At the supplemental hearing, held by telephone,
13 plaintiff was not called to be present and not allowed to offer
14 testimony.

15 There is no dispute that the ALJ suspended the first
16 hearing on May 20, 2004. Tr. 1155-74. The ALJ stated:

17 Counsel, I want to get a little bit more information
18 before we continue. I would like to get updates
19 that - from the emergency rooms. I'm additionally
20 going to get arrest and disposition record[s].
21 Apparently your husband knows more about the
22 employment, I would ask you to see if you can get
23 him to assist with getting an update on employment
24 records that we have. Admittedly they're few and
25 far between, but let's see if we can [get] an
26 update. In the meantime I'm going to order an
27 orthopedic consultative evaluation with regard to her
28 capabilities with regard to the right hand. And
since the psychological is two years out of date,
we'll get an update on the psychological too. Okay?

[Attorney]: So are you then ordering a psychological
exam, is that -

[ALJ]: That's correct. Okay. When we got those items

1 back in we'll come back in, and we'll finish up. Okay?¹

2 [Attorney]: Thank you, Your Honor.

3 [ALJ]: All right. That will conclude the hearing for
4 today[.]

5 Tr. 1173-74.

6 Following the first hearing, plaintiff's counsel sent the
7 ALJ correspondence that included a Medical Source Statement and
8 cover letter dated August 2, 2004. Tr. 863-865. On August 26,
9 2004, plaintiff's counsel sent a more readable version of the
10 same exhibit and another cover letter wherein plaintiff requested
11 a supplement hearing.² Plaintiff argues to the court that she
12 requested the supplemental hearing because she did not have an
13 opportunity to testify in the original hearing, nor did she have
14 an opportunity to respond to any questions posed by her attorney.
15 Plaintiff states that a supplemental hearing was also requested
16 because of the ALJ's advisement after the first hearing that the
17 hearing would continue at a later time.

18 Plaintiff alleges that although she was provided notice of
19 the second hearing, she was not called to testify. Tr. 27-28.
20 Plaintiff alleges that the decision not to have plaintiff present
21 or testify at the hearing was made solely by the ALJ.
22 Plaintiff's counsel represents that a discussion was held off-
23 the-record prior to the commencement of the second hearing,
24 wherein the ALJ advised plaintiff's counsel that he was seeking

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26 ¹ Transcript attributes this statement to the attorney,
27 however, plaintiff's counsel notes that the transcript is
28 in error and that the statement was made by the ALJ.

² This letter is not part of the Administrative Record. A
copy is attached to Plaintiff's Memorandum.

1 only vocational expert testimony.

2 Plaintiff's counsel states that prior to the commencement
3 of the second hearing, he believed that the ALJ had decided to
4 grant plaintiff's claim for benefits. This belief was based on:
5 (1) the ALJ's advisement that a "continued" hearing would
6 commence following receipt of additional information; (2)
7 plaintiff requested a supplemental hearing; (3) the ALJ decided
8 not to allow a supplemental hearing for the purpose of taking
9 additional testimony from plaintiff despite plaintiff's "clear
10 right to have the hearing; (4) pursuant to the ALJ's request
11 post-hearing for a summary of all records of plaintiff's treating
12 psychologist, Sharon Schmidt, Psy.D; and (5) the ALJ's off-the-
13 record discussion with plaintiff's counsel prior to the second
14 hearing where the ALJ explained that he was seeking only
15 vocational expert testimony at the supplemental hearing.

16 I find, however, that plaintiff's counsel could have
17 rectified the alleged misunderstanding regarding plaintiff's
18 appearance at the supplemental hearing by simply requesting that
19 plaintiff be called for the hearing. I find no indication in the
20 record that plaintiff's counsel ever requested that plaintiff be
21 called for the hearing. Further, there is no indication in the
22 record that the ALJ denied any request to have plaintiff appear
23 at the hearing and testify. Finally, I find no indication in the
24 record that plaintiff's counsel objected to plaintiff's absence
25 from the hearing.

26 Moreover, the record indicates that plaintiff failed to
27 raise this issue in her request for review by the Appeals
28 Counsel. The first objection by plaintiff to her failure to

1 appear at the supplement hearing is before this court on appeal.
2 Despite plaintiff's counsel's belief in how the ALJ intended to
3 rule on plaintiff's claim, I find nothing in the record to
4 indicate that the ALJ represented to plaintiff's counsel that he
5 intended to grant plaintiff's claim. Seemingly, the ALJ did
6 believe that no further testimony by plaintiff would be
7 necessary, however, nothing in the record supports the conclusion
8 that the ALJ hindered plaintiff's counsel from presenting further
9 testimony by plaintiff.

10 Finally, and notably, the plaintiff does not make any
11 assignment of error to the ALJ's detailed credibility
12 determination regarding the plaintiff. Tr. 19-23. Therefore,
13 given the ALJ's negative credibility determination regarding
14 plaintiff's claims and her testimony at the first hearing, there
15 is no reason to believe that further testimony from plaintiff
16 would not have been similarly discounted by the ALJ as not
17 credible. I find no violation by the ALJ in conducting a
18 supplemental hearing without plaintiff's testimony when there is
19 no record of a request for such testimony by plaintiff's counsel,
20 or of the ALJ disallowing a request by plaintiff's counsel for
21 such testimony.

22 Plaintiff next alleges that the ALJ failed to pose a
23 complete and proper hypothetical to the vocational expert (VE).
24 Plaintiff argues that the ALJ failed to incorporate DDS
25 physician, Michael Villanueva's, Psy.D, conclusion that plaintiff
26 was moderately limited in her ability to respond appropriately to
27 work pressures in a usual work setting. Tr. 857.

28 Dr. Villanueva qualified his finding stating that

1 plaintiff's alcohol abuse contributed to the limitations set
2 forth on the assessment. Tr. 857. While the ALJ found Dr.
3 Villanueva's findings entitled to substantial weight, he also
4 noted that plaintiff's impairments were related to her substance
5 abuse. Tr. 21-22. Considering that Dr. Villanueva's opinion
6 that plaintiff's functional limitations were at least in part
7 attributable to alcohol abuse, the ALJ did not err in failing to
8 include this limitation in his residual functional capacity
9 assessment.

10 Similarly, other DDS physicians developed other
11 restrictions regarding plaintiff's abilities that plaintiff
12 alleges the ALJ failed to incorporate into the hypothetical.
13 Specifically, plaintiff points to the determinations of Dorothy
14 Anderson, Ph.D and Bill Hennings, Ph.D, that plaintiff was
15 moderately limited in her ability to work in coordination with or
16 proximity to others without being distracted by them. Tr. 219.
17 Drs. Anderson and Hennings also found that plaintiff was
18 moderately limited in her ability to interact appropriately with
19 the general public. Tr. 220-21. Plaintiff alleges that the ALJ
20 stated that the assessments of Drs. Anderson and Hennings were
21 "supported by the evidence," but failed to incorporate these
22 limitations into the hypothetical. Tr. 24.

23 The ALJ summarized and evaluated the May and August 2003,
24 opinions of Drs. Anderson and Peter LeBray. Tr. 23, 338-55. The
25 ALJ did not, however, discuss the May 2002, opinions referred to
26 above of Drs. Anderson and Hennings because their opinions do not
27 relate to the period of disability at issue. The ALJ
28 appropriately considered the May 2003, opinions of Drs. Anderson

1 and LeBray, in lieu of the May 2002 opinions of Drs. Anderson and
2 Hennings, because the May 2003 opinion refers to the relevant
3 time period beginning December 30, 2002, the date plaintiff's
4 alleged disability commences. Moreover, the Commissioner need
5 not discuss all evidence presented to her. Vincent v. Heckler,
6 739 F.2d 1393, 1394-95 (9th Cir. 1984). The ALJ must only
7 consider the evidence that is relevant and probative. Gonzalez
8 v. Sullivan, 914 F.2d 1197, 1200-01 (9th Cir. 1990). In sum, the
9 opinions of Drs. Anderson and Hennings predate the period of
10 disability at issue and are therefore irrelevant.

11 The court notes again that plaintiff fails to challenge the
12 ALJ's negative credibility determination. This issue is central
13 to the ALJ's evaluation of the evidence and assessment of
14 plaintiff's residual functional capacity. The ALJ's residual
15 functional capacity finding properly considered all of the
16 credible medical evidence and testimony and is based on
17 substantial evidence in the record.

18 Regarding plaintiff's dispute with the ALJ's finding that
19 the plaintiff can perform her past relevant work, a plaintiff has
20 the burden of showing that she can no longer perform her past
21 relevant work. See 20 C.F.R. §§ 404.1520(e), 416.920(e).
22 Specifically, at Step Four, the ALJ is required to make findings
23 as to plaintiff's residual functional capacity, the physical and
24 mental demands of past jobs, and whether her residual functional
25 capacity would permit her to return to her past job. Plaintiff
26 has the burden to produce evidence at this step. Plaintiff
27 failed to meet this burden. The ALJ's finding was supported by
28 the testimony of the vocational expert in response to the ALJ's

1 hypothetical vocational question that adequately included all of
2 plaintiff's limitations. I find the ALJ's Step Four finding that
3 plaintiff could perform her past relevant work as a fast food
4 worker and motel cleaner supported by substantial evidence. Tr.
5 24.

6 Alternatively, the ALJ found that plaintiff could also
7 perform other work existing in significant numbers in the
8 national economy. Tr. 24-25. See Tackett v. Apfel, 180 F.3d
9 1094, 1099 (9th Cir. 1999) (describing inquiry at Step Five of the
10 sequential evaluation process). The ALJ relied upon vocational
11 expert testimony because plaintiff's vocational criteria (age,
12 education, residual functional capacity, and work experience) did
13 not coincide with any of the Guideline rules. The vocational
14 expert considered whether an individual with the same vocational
15 profile as plaintiff could perform a significant number of jobs
16 in the national economy, including plaintiff's proposed
17 hypothetical that included a marked limitation in the ability to
18 remember and carry out detailed instructions. Tr. 25, 1188-89.
19 The vocational expert identified three occupations (cashier,
20 ticket seller, and office helper) that represented significant
21 jobs existing in the national economy. Tr. 25, 1190-91. I find
22 no error here.

23 Finally, plaintiff's allegation that the ALJ failed to
24 develop the record is rejected.

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1 **CONCLUSION**

2 The Commissioner's decision is based on substantial
3 evidence, and is therefore, affirmed. This case is dismissed.
4 IT IS SO ORDERED.

5 Dated this 20 day of June 2006.

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8
9 /s/ Ann Aiken

10 Ann Aiken
11 United States District Judge
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